Supreme Court, U.S.
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No. 98-404

In The

Supreme Court of the United States

October Term, 1998

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,

Appellants,

vs.

UNITED STATES HOUSE OF REPRESENTATIVES, ET AL.,

Appellees.

On Direct Appeal From The United States District Court For The District Of Columbia

BRIEF ON THE MERITS OF CALIFORNIA LEGISLATURE, ET AL.

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Census Act prohibits the Secretary of Commerce from using statistical sampling to ensure that the year 2000 census for apportionment purposes will be as accurate as it is within his power to make it.

2. Whether Article I, Section 2, Clause 3 of the United States Constitution prohibits the Secretary of Commerce from using statistical sampling to conduct the decennial census for apportionment purposes when there is no dispute that sampling will provide a more accurate result.

PARTIES TO THE PROCEEDING IN THE COURT BELOW

The parties to the District Court proceedings are the following:

Plaintiff:

United States House of Representatives.

Defendants:

The United States Department of Commerce; William M. Daley, in his capacity as Secretary of the United States Department of Commerce; Bureau of the Census; James F. Holmes, in his capacity as Acting Director of the Bureau of the Census.

Intervenors as Defendants:

Legislature of the State of California, et al.: Legislature of the State of California; the California Senate; John Burton, individually and as President Pro Tempore of the California Senate; the California Assembly; Antonio Villaraigosa, individually and as Speaker of the California Assembly.

Richard A. Gephardt, et al.: Richard A. Gephardt, Danny K. Davis, Juanita Millender-McDonald, Lucille Roybal-Allard, Louise M. Slaughter, Bennie G. Thompson, individually and in their official capacities as Members of the United States House of Representatives.

City of Los Angeles, et al.: City of Los Angeles; City of New York; County of Los Angeles; City of Chicago; City and County of San Francisco; Miami-Dade County; City of Inglewood; City of Houston; City of San Antonio;

PARTIES TO THE PROCEEDING IN THE COURT BELOW – Continued

City and County of Denver; City of Long Beach; City of San Jose; City of Stamford; City of Oakland; City of Cudahy; County of Santa Clara; County of San Bernadino; County of Alameda; County of Riverside; State of New Mexico; U.S. Conference of Mayors; League of Women Voters of Los Angeles; Carolyn Maloney, Christopher Shays, Tom Sawyer, Rod Blagojevich, Bobby Rush, Luis Gutierrez, John Conyers, Jr., Jose Serrano, Cynthia McKinney, Charles Rangel, Donald Payne, Howard Berman, Xavier Beccera, Loretta Sanchez, Julian Dixon, Henry Waxman, Maxine Waters, Esteban Torres, Sheila Jackson Lee, individually and in their official capacities as Members of the United States House of Representatives; City of Detroit; City of Bell; City of Gardena; City of Huntington Park; Members of Congress Robert Menendez, Ed Pastor, Silvestre Reyes, Ciro Rodriguez and Carlos Romero-Barcelo.

National Korean American Service & Education Consortium, Inc., et al.: National Korean American Service & Education Consortium, Inc.; Organization of Chinese Americans, Inc.; Organization of Chinese Americans, Los Angeles, California Chapter; Search to Involve Pilipino Americans, Inc.; United Cambodian Community, Inc.; League of United Latin American Citizens; California League of United Latin American Citizens; National Association of Latino Elected and Appointed Officials, Inc.; Mothers of East Los Angeles; Hee-Sook Kum; Adeline M.L. Yoong; Michael Balaoing; Sovann Tith; Johnny M. Rodriguez; Chayo Zaldivar; Gilberto Flores; Alvin Parra.

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United States House of Representatives v. United States Department of Commerce, 11 F. Supp.2d 76, 1998 WL 556342 (D.D.C., Aug. 24, 1998)

STATEMENT OF JURISDICTION IN THIS COURT

This Court has jurisdiction pursuant to section 209(e)(1) of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998 ("Appropriations Act of 1998"), Pub. L. No. 105-119, § 209(e)(1), 111 Stat. 2440, 2482 (1997). The text of this provision is set forth in the Appendix hereto at App. 6.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved herein, whose text is set forth in the Appendix hereto are as follows:

U.S. Constitution, Article I, Section 2, Clause 3

U.S. Constitution, Article I, Section 9, Clause 4

U.S. Code, Title 13, Section 141

U.S. Code, Title 13, Section 195

Pub. L. No. 105-119, 111 Stat. 2440, 2482 (1997), Section 209(e)(1).

STATEMENT OF THE CASE

The Great Compromise established a system of federal government in which the small states were each guaranteed two senators and at least one representative and the large states were guaranteed that, in all other respects, representation in the Congress would be based upon proportionality. Article I, Section 2 provides that this proportional representation shall be according to each state's population. U.S. Const. art I, § 2. The constitutional commitment to these values has been reflected in continuing efforts to produce an accurate census. To that end, the Census Bureau and the Department of Commerce, to whom the decennial census has been entrusted, have over the years tested and then implemented an array of conventional and unconventional techniques, technologies and strategies for improving census accuracy. U.S. Department of Commerce, Bureau of the Census, *Report to Congress – The Plan for Census 2000* (August 1997) ("*Census 2000 Report*"), Joint Appendix ("Joint App.") 46-47; *see generally* Harvey Choldin, *Looking for the Last Percent: The Controversy Over the Census Undercounts* (1994); Margo J. Anderson, *The American Census: A Social History* (1988). These efforts have been all the more important since the 1960s with the advent of decennial redistricting requirements,[1] civil rights legislation[2] and the increased use of census figures for economic and social planning and for allocation of federal funds. *See generally Census 2000 Report*, Joint App. 40, 46;

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[1] *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1984).

[2] *See, e.g.*, Voting Rights Act, 42 U.S.C. § 1973 (1994).

National Research Council, *Modernizing the U.S. Census*, National Academy Press, Washington, D.C. 1995 at 24-26, 259-339; Choldin, *supra*, at 26-29; Anderson, *supra*, at 213-14.

For the past several decades, persistent and prominent criticism has been directed at the significant undercount that has marked the decennial census. *See* Choldin, *supra*, at 1-3, 30-33, 84-118; Anderson, *supra*, at 221-24. Any significant undercount is of concern, but the decennial census undercount is of particular concern because it is dramatically disproportionate among different states, sectors in the society and racial and ethnic groups. This differential undercount thus seriously compromises the values of equal representation and one-person-one-vote. *Census 2000 Report*, Joint App. 49.

From 1940 to 1980 the Census Bureau was able to improve the accuracy of the census each decade. *Census 2000 Report*, Joint App. 40-41. This was achieved in large part by shifting from door-to-door enumerators to mail-out-mail-back procedures whereby households submit their own count, by innovative methods such as the Postal Vacancy Check which uses sample neighboring households to impute the population of units that have been labeled vacant by the Post Office but in fact appear to be occupied, by creative community outreach and response campaigns, and by increased funding and intensified efforts using conventional methods of counting. *See id.*, Joint App. 46-47; *see also Modernizing the U.S. Census* at 19-21, 228-38; Choldin, *supra*, at 65.

By 1990, the efficacy of these methods had reached its limit, and, despite the fact that it "surpassed all previous

censuses in terms of design, execution and resources used, the 1990 census took a large step backwards in terms of accuracy." *Census 2000 Report*, Joint App. 40; *see also id.*, Joint App. 47-52. The census undercount in 1990 was 50 percent greater than the rate in 1980. *Id.*, Joint App. 48. In the 1990 census, children were much more likely to be undercounted than adults, and renters, particularly in rural areas, were more likely to be missed than homeowners. *Id.*, Joint App. 48-49. The 1990 undercount rates were six times larger for African Americans than for non-Hispanic Whites, seven times larger for Hispanics and three times larger for Asians and Pacific Islanders; nearly one out of every eight American Indians living on reservations was not counted *Id.*, Joint App. 49; *Modernizing the U.S. Census* at 43, note 2; *see also* 1991 Commerce Decision, 56 Fed. Reg. 33582 (1991).

In California, which has substantial populations of Hispanics, Asians and Pacific Islanders, the 1990 census failed to account for approximately 834,000 people, roughly 2.8 percent of the state's 1990 population compared to a nationwide rate of 1.4 percent. Declaration of Geoffrey Long [filed below with California Legislative Parties' Consolidated Reply in Support of Intervention, April 24, 1998]. As a result, California lost one congressional seat and was forced to bear a disproportionate share of the costs of services because of the loss of millions of dollars in federal funding. *Id.; Modernizing the U.S. Census* at 38-40.

Since the 1970s, the Census Bureau and other experts in the field have been working on statistical techniques that could be used to correct the differential undercount.

See, e.g., Programs to Reduce the Decennial Census Undercount, Department of Commerce: Report to the House Committee on Post Office and Civil Service by the Comptroller General of the United States, GAO Rep. No. GGD-76-72, at 21-22 (May 5, 1976) (*"1976 GAO Report"*) (reporting efforts in the 1970s); *Wisconsin v. City of New York*, 517 U.S. 1, 10 (1996) (reviewing efforts in the mid-1980s); *see also* Choldin, *supra*, at 119-33. The Census Bureau's initial plan for the 1990 census included statistical techniques somewhat like those planned for the 2000 census. Choldin, *supra*, at 119-36. Litigation was commenced in 1988 in an attempt to require statistical correction. *See City of New York v. Department of Commerce*, 739 F. Supp. 761 (E.D.N.Y. 1990). Ultimately, the Secretary of Commerce declined to use statistical sampling to correct the undercount on the grounds that, although it would improve the accuracy of the overall count, it would not improve the accuracy of the distributive count among the states, which was more important for apportionment purposes. 1991 Commerce Decision, 56 Fed. Reg. at 33583.[3] This Court unanimously upheld the Secretary's exercise of discretion. *Wisconsin*, 517 U.S. at 19-20.

In response to concerns over the 1990 census undercount, bipartisan legislation was passed by a unanimous Congress and signed by President Bush in 1991, directing the National Academy of Sciences to study the "means by which the Government could achieve the most accurate

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[3] As is discussed below, this concern has been resolved by changes in the statistical sampling procedures planned for the 2000 census.

population count possible." Decennial Census Improvement Act of 1991, Pub. L. No. 102-135, § 2(a)(1), 105 Stat. 635, 635 (1991); *see also Census 2000 Report*, Joint App. 53. The congressional directive included instructions that the National Academy consider "the appropriateness of using sampling methods." Decennial Census Improvement Act of 1991, § 2(b)(1)(C). The National Academy, after extensive study, recommended that what is commonly known as statistical sampling be used in the 2000 census. It concluded that the "[d]ifferential undercount cannot be reduced to acceptable levels at acceptable costs without the use of integrated coverage measurement and the statistical methods associated with it." *Census 2000 Report*, Joint App. 53-55.

Based on the work and recommendations of the National Academy, its own internal studies, recommendations from several advisory committees, public meetings and congressional input, the Census Bureau developed a plan for the 2000 census that included the use of statistical sampling to supplement data obtained through traditional census methods. *Census 2000 Report*, Joint App. 42-43, 56-58. By the time this determination was reached, two important things had become clear. First, unlike the techniques rejected in 1990, the statistical sampling techniques available for the 2000 census will improve both overall and distributive accuracy: "At all geographic levels important to political representation and funds allocation, Census 2000 will provide more accurate results than physical enumeration alone." *Census 2000 Report*, Joint App. 44. Second, no matter how much money and effort are devoted to traditional methods, use

of those methods by themselves, without statistical sampling, cannot improve accuracy. *Modernizing the U.S. Census* at 3; *Census 2000 Report*, Joint App. 42, 49-52, 99, 121-23. As the National Academy Panel on Requirements put it:

> It is fruitless to continue trying to count every last person with traditional Census methods of physical enumeration. Simply providing additional funds to enable the Census Bureau to carry out the 2000 Census using traditional methods, as it has in previous Censuses, will not lead to improved coverage or data quality.
>
> *Census 2000 Report*, Joint App. 54.

After it became apparent that the Census Bureau planned to use statistical sampling as part of the 2000 census, an effort by the 105th Congress to prohibit the use of sampling failed when the President vetoed that legislation. Supplemental Appropriations Act, H.R. 1469, 105th Cong. tit. VIII(b)(1) (1997); 33 Weekly Comp. Pres. Docs. 846 (June 9, 1997). Subsequently, legislation was passed that did not include such a prohibition, but that authorized the House of Representatives and other parties to bring litigation testing their argument that pre-existing law or the Constitution already restrained the Census Bureau from using sampling techniques to ensure the accuracy of the census. Appropriations Act of 1998 §§ 209, 210, 111 Stat. at 2480-87. Congress granted original jurisdiction to three judge district courts with direct appellate review to this Court. *Id.* § 209(e)(1), 111 Stat. at 2482.

On February 20, 1998, at the direction of the Speaker of the House, this lawsuit was filed on behalf of plaintiff United States House of Representatives. The complaint

sought a declaration that the use of sampling to determine population for congressional apportionment purposes violates the Census Act, 13 U.S.C. §§ 1-307 (1990), Article I, Section 2, Clause 3 of the United States Constitution and the Fourteenth Amendment. Plaintiff further sought a permanent injunction preventing defendants from using sampling in the apportionment aspect of the 2000 census.

The suit named as defendants the Department of Commerce, the Secretary of Commerce, the Census Bureau and its Director. Members of Congress, the California Legislature and its leadership, certain states and local jurisdictions, as well as certain public interest groups, sought and were granted leave to intervene as defendants. *See* Parties to the Proceeding in the Court Below, *supra* at ii.

The federal defendants moved to dismiss on grounds of standing, ripeness, justiciability, separation of powers and failure to state a claim for relief. *See* Memorandum Opinion filed August 24, 1998 ("Mem. Opn."), Appendix to Jurisdictional Statement ("Juris. App.") 2a, 11a. The California Legislature and other intervenors filed their own motions to dismiss under Federal Rule of Civil Procedure 12(b)(6) on the grounds that plaintiff's complaint failed to state a claim on which relief could be granted. *See* Mem. Opn., Juris. App. 2a. Plaintiff moved for summary judgment on the merits of the statutory and constitutional claims. *See* Mem. Opn., Juris. App. 2a, 45a-46a.

On August 24, 1998, the three-judge court filed its opinion, order and judgment denying the defendants' and intervenors' motions to dismiss and granting the

plaintiff's motion for summary judgment. The court ordered "that defendants are permanently enjoined from using any form of statistical sampling, including their program for nonresponse follow-up and Integrated Coverage Measurement, to determine the population for purposes of congressional apportionment." Juris. App. 67a. The court found that the Census Act prohibited the Census Bureau from using sampling and therefore did not find it necessary to reach the constitutional issues.

The federal defendants filed their notice of appeal on August 25, 1998. This Court noted probable jurisdiction in case number 98-404 on September 10, 1998, and, pursuant to a joint motion, ordered expedited briefing and oral argument. The California Legislature filed its notice of appeal on August 28, 1998, filed its Jurisdictional Statement on September 8 in case number 98-413, and filed its motion to consolidate the appeals and for expedited review on September 14, 1998. The California Legislature seeks review in this Court of the district court's ruling on the merits of the challenge to the Secretary's authority. It does not appeal the district court rulings on standing, ripeness, justiciability and separation of powers.

SUMMARY OF THE ARGUMENT

Congress has delegated to the Department of Commerce "virtually unlimited discretion" in conducting the census. *Wisconsin*, 517 U.S. at 19. Under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and its progeny, therefore, the Department's reasonable interpretation of the Census Act is entitled to deference unless

Congress has "directly spoken to the precise question at issue" and "unambiguously expressed" a contrary intent. *Chevron*, 467 U.S. at 842-45.

When Congress was considering 1976 amendments to the Census Act it was aware the Bureau of the Census had extensively used sampling techniques in the 1970 census for all purposes, notwithstanding the language of 13 U.S.C. § 195, which provided that "except for the determination of population for apportionment purposes, the Secretary *may*, where he deems it appropriate, authorize the use of the statistical method known as 'sampling'. . . . " Act of Aug. 28, 1957, Pub. L. No. 85-207, sec. 14, § 195, 71 Stat. 481, 484 (1957) (emphasis added).

If Congress found the 1970 use of statistical sampling to improve the population count unacceptable, surely it would have said so. Instead, Congress added the language of section 141(a) explicitly authorizing the Secretary of Commerce to use sampling procedures as part of the decennial census and placing no restrictions on the Secretary's discretion to use those procedures:

> The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date", in such form and content as he may determine, including the use of sampling procedures and special surveys. . . .
>
> 13 U.S.C. § 141(a).

At the same time, Congress raised the stakes with respect to the language of section 195. Where before, in areas other than apportionment the Secretary was

authorized to use sampling "where he deems it appropriate," Act of Aug. 28, 1957, sec. 14, § 195, the new language *required* the Secretary to use sampling if "feasible" in areas other than apportionment. 13 U.S.C. § 195. That change was accomplished by the change from "may where he deems it appropriate" to "shall, if he considers it feasible" in section 195. Thus the two sections are easily harmonized: for all purposes the Secretary *may* use sampling, 13 U.S.C. § 141(a), and the Secretary *must* use sampling at any time that it is "feasible" except for purposes of apportionment. *Id.* § 195. For purposes of apportionment, the Secretary is neither required to nor prohibited from using sampling, but may use it if, as here, he determines that he can do so with the level of confidence that the constitutional command for an "actual enumeration" requires.

Congress could, of course, have used more direct language, but in the absence of an unambiguous message to the contrary the default is that the Secretary has complete discretion to use sampling. " 'The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.' " *Chevron*, 467 U.S. at 843 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)). Where "the agency's interpretation of a statute is at least as plausible as competing ones, there is little, if any, reason not to defer to its construction [particularly when that construction] so closely fits 'the design of the statute as a whole and . . . its object and policy.' " *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 417-18 (1993) (quoting *Crandon v. United States*, 494 U.S. 152, 158 (1990)).

Nor does the call in Article I, Section 2, Clause 3 for an "actual enumeration" for apportionment purposes serve to deny the Secretary the discretion to use sampling techniques. Indeed, a review of the history of that section makes it clear that "actual enumeration" was in contrast to the "mere conjecture" and guesswork that were used for the first apportionment. *See* 1 *The Records of the Federal Convention of 1787*, 578 (Max Farrand ed., rev. ed. 1937). The Secretary's effort to secure the most accurate numbers possible is fully "consistent with the constitutional language and the constitutional goal of equal representation . . . " *Wisconsin*, 517 U.S. at 19-20 (citation omitted). Just as the Secretary's decision not to adjust in 1990 "need bear only a reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census," *id.* at 20, his decision that the state of the art is now such that statistical sampling is the most direct route to the constitutional goal may not be disturbed.

ARGUMENT

I. THE DEPARTMENT OF COMMERCE INTERPRETATION OF THE CENSUS ACT SHOULD BE SUSTAINED

Congress has delegated to the Department of Commerce "virtually unlimited discretion" in conducting the census. *Wisconsin*, 517 U.S. at 19; *see also Franklin v. Massachusetts*, 505 U.S. 788 (1992); 13 U.S.C. § 141(a). Under *Chevron*, and its progeny, therefore, the Department's reasonable interpretation of the Census Act is entitled to deference unless Congress has "directly spoken to the

precise question at issue" and "unambiguously expressed" a contrary intent. 467 U.S. at 842-45; *see also National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, ___ U.S. ___, 118 S. Ct. 927, 938-39 (1998); *Auer v. Robbins*, ___ U.S. ___, 117 S. Ct. 905, 909 (1997); *Smiley v. Citibank*, 517 U.S. 735, 739 (1996); *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 414 (1993); *Rust v. Sullivan*, 500 U.S. 173, 186-90 (1991); *National Labor Relations Bd. v. Iron Workers*, 434 U.S. 335, 350-52 (1990). It has not done so here.

A. Congress Has Not Expressed an Unambiguous Intent to Prohibit the Use of Sampling Contemplated Here

At the heart of this controversy are two provisions of the Census Act that address the use of sampling in the decennial census. 13 U.S.C. §§ 141(a) and 195. In 1976, Congress, in a single bill, amended both of these sections in a manner that is the source of contention here. Act of Oct. 17, 1976, Pub. L. No. 94-521, 90 Stat. 2459 (1976). Plaintiff contends that the statute absolutely prohibits the use of sampling to count the population for apportionment purposes. Defendants contend that the statute leaves such use to the discretion of the Secretary of Commerce.

The 1976 amendments to the Census Act, as they related to statistical sampling in the decennial census, did two things: First, section 141(a), which is the statutory authority for the Department of Commerce to conduct the decennial census, was amended by adding new language specifically authorizing the Secretary of Commerce to

take a decennial census "in such form and content as he may determine, *including the use of sampling procedures . . .* " 13 U.S.C. § 141(a) (emphasis added). At the same time, section 195 was amended to state that "[e]xcept for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary *shall,* if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." 13 U.S.C. § 195 (emphasis added). Prior to the 1976 amendments, section 195 had stated: "Except for the determination of population for apportionment purposes, the Secretary *may,* where he deems it appropriate, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." Act of Aug. 28, 1957, sec. 14, § 195, 71 Stat. at 484 (emphasis added).

Other parties to these proceedings will present the argument that the Census Act unequivocally authorizes the use of statistical sampling at issue here. At a minimum, however, these provisions of the Census Act, as amended in 1976, are certainly susceptible to that interpretation. This is evident from the disagreement among the lower courts[4] and among the branches of

[4] The interpretation advanced by the district court in this case is at odds with the views of numerous other courts that have addressed the Department's authority to use statistical sampling. *See City of New York v. Department of Commerce,* 34 F.3d 1114, 1124-25 (2nd Cir. 1994), *rev'd on other grounds, Wisconsin v. City of New York,* 517 U.S. 1 (1996); *City of New York v. Department of Commerce,* 739 F. Supp. 761, 767-68 (E.D.N.Y. 1990); *Cuomo v. Baldrige,* 674 F. Supp. 1089, 1096 n.13 (S.D.N.Y. 1987); *Young v. Klutznick,* 497 F. Supp. 1318, 1334-35 (E.D. Mich. 1980), *rev'd on other grounds,* 652 F.2d 617 (6th Cir. 1981), *cert. denied, Young v. Baldrige,* 455 U.S. 939 (1982); *Carey v. Klutznick,* 508 F. Supp. 404, 415 (S.D.N.Y. 1980); *City of Philadelphia v. Klutznick,* 503 F. Supp. 663, 679 (E.D.Pa. 1980).

government[5] as to the statute's proper interpretation. *Cf. Smiley v. Citibank,* 517 U.S. 735, 739 (1996) (ambiguity evident from dissenting opinions and conflicting rulings in the state courts). That the statute does not unambiguously forbid the use of statistical sampling is further demonstrated by the fact that Congress, without success, attempted to enact legislation in 1997 to prohibit the use of statistical sampling. H.R. 1469, tit. VIII(b)(1). If the Census Act already contained an unambiguously clear prohibition, the legislation would not have been necessary.

[5] The litigation position of the House is at odds both with the executive and with previous legislative statements. The executive branch has made its disagreement obvious not only through the Department of Commerce and the Census Bureau but also through an express statement in the President's veto message on H.R. 1469 in the 105th Congress. *See* 33 Weekly Comp. Pres. Docs. 846 (June 9, 1997). Additionally, the current interpretation of the House appears to be at odds with previous Congressional support for sampling methods. For example, in 1991, a bipartisan Congress directed a study to find ways to make the census more accurate, including the use of sampling. Decennial Census Improvement Act of 1991, §§ 2(a)(1), 2(b)(1)(C), 105 Stat. at 635. This congressional mandate and the time and expense involved in this study makes no sense if the Census Act clearly prohibited the use of sampling.

The absence of a clear congressional prohibition is further evidenced by the historical circumstances in which the 1976 amendments were adopted.

Most significantly, the 1970 census, which was in front of the Congressional oversight committee at the same time as the 1976 amendments to the Census Act, used sampling to improve the count for apportionment purposes and received no criticism at the time.[6] It was during the 1970 census that the Department began using the National Vacancy Check, also known as the Postal Vacancy Check, which became an established part of census procedures and has not been challenged here. *Census 2000 Report*, Joint App. 82; Bureau of the Census, *Effect of Special Procedures to Improve Coverage in the 1970 Census*, PHC(E)-6, at 11-12 (December 1974).[7] The Postal Vacancy Check uses neighboring sample households to

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[6] In *Wisconsin v. City of New York*, this Court found the 1970 sampling was different in kind and much smaller in scale than the sampling considered for the 1990 census. 517 U.S. at 22. Here the significance of the 1970 experience and the continued use since 1970 of the Postal Vacancy Check, which uses sampling to add to the population count, have different implications. The challenge to the Secretary's authority here does not permit distinctions based upon character and scale of sampling. The challenge here is not to some particular form of statistical sampling but to any use of statistical sampling for apportionment purposes. Thus, past use of statistical sampling and its approval by Congress, even on a much smaller scale, cannot be overlooked.

[7] Although plaintiff's interpretation of the Census Act throws the use of the National Vacancy Check in doubt, plaintiff has not challenged that part of the Census 2000 plan. Mem. Opn., Juris. App. 5a.

impute population figures and information about households that have been designated vacant but that seem to be occupied, despite the fact that their inhabitants cannot be located. *Id.*; *1976 GAO Report* at 12. The 1970 census also used sampling as part of the post-enumeration check to account for population that the enumerators had missed in sixteen Southern states. *Effect of Special Procedures to Improve Coverage in the 1970 Census* at 15-16; *1976 GAO Report* at 12.

These sampling procedures added about 1.5 million people to the 1970 census. *See Census 2000 Report*, Joint App. 82; *Effect of Special Procedures to Improve Coverage in the 1970 Census* at 2, 3; *1976 GAO Report* at 12. The Census Bureau concluded that "[w]ithout this program, there would have been a significant deterioration in population coverage from 1960." *Effect of Special Procedures to Improve Coverage in the 1970 Census* at 2.[8]

Between 1970 and 1976, when the Census Act was amended, the use and the effectiveness of sampling for purposes of the decennial census was repeatedly brought to Congress' attention. In 1971, for example, the Report of the Decennial Census Review Committee was submitted to the full Congress and published in the Congressional Record. 117 Cong. Rec. 29722 (Aug. 4, 1971). It summarized census improvement efforts, including the Postal Vacancy Check and the post-enumeration check, *id.* at

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[8] The vacancy check showed that nationally over 11 percent of the units initially assumed to be vacant should have been enumerated as occupied. *Effect of Special Procedures to Improve Coverage in the 1970 Census* at 12; *Census 2000 Report*, Joint App. 82.

29726, and described the conduct of the census in laudatory terms as follows:

> Planning and execution of the decennial census is carried on at a commendably high level of technical competence and with proper concern for comprehensiveness, accuracy, and economy. The procedures used have been refined and developed over time through a blend of experience, analytical examination of that experience, and imaginative innovation.
>
> *Id.* at 29723.

The Census Bureau's 1976 report on the procedures used in the 1970 census made no bones about the fact that they included sampling and evaluated their effectiveness as follows:

> Evaluation studies . . . show that both steps were very effective in adding persons presumed to have been missed in the enumeration. The vacancy check had the greatest impact on the census count of any measurable coverage improvement program. Both programs are, however, subject to the qualification that they depended on imputation of persons not specifically identified in the field.
>
> Bureau of the Census, *1970 Census of Population and Housing: Procedural History*, PHC(R)-1, at 7-6 (June 1976).[9]

[9] A 1974 Census Bureau Report on the efforts to improve coverage had similarly made it plain that the new procedures involved the use of sampling:

> The second type [of improvement program] included a group of projects intended to locate households or individuals that were missed in the initial field activities and add them to the census counts. In some of the most important of these projects, sampling was used and, as a result, only estimates of missed persons and housing units could be added to the counts.
>
> Bureau of the Census, *Effect of Special Procedures to Improve Coverage in the 1970 Census* at 1; *see also id.* at 11-16 (describing each program in detail).

The Census Bureau reported that these programs using sampling not only improved overall coverage but also "tended to increase the coverage completeness for those areas and population subgroups for which census coverage had been poorest in the past. Thus, while these procedures did not completely overcome the coverage problems, they tended to decrease the *differentials* in coverage completeness among areas and among population subgroups." *Id.* at 2 (emphasis in original).

While Congress was considering the 1976 amendments to the Census Act, the Comptroller General submitted a Report to the House Committee on Post Office and Civil Service that again described the use of sampling in the 1970 Census and the improved coverage that resulted. *1976 GAO Report* at 21-22. This was the same Congressional Committee that reported on H.R. 11337, the 1976 amendments to the Census Act. *See* H.R. Rep. No. 94-944 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5463. Thus, at the time of the 1976 amendments to the Census Act, Congress was fully aware that, notwithstanding the prohibition in 13 U.S.C. § 195 before it was amended, the Bureau of the Census had used sampling to supplement and improve the 1970 census population count. The legislative history reveals no congressional complaints about that practice.

If Congress found this use of statistical sampling to improve the population count unacceptable, surely it would have said so. Instead, in the 1976 amendments to the Census Act, Congress added language to section 141(a) explicitly authorizing the Secretary of Commerce to use sampling procedures as part of the decennial census and placing no restrictions on the Secretary's discretion to use those procedures:

> The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date", in such form and content as he may determine, including the use of sampling procedures and special surveys.
>
> 13 U.S.C. § 141(a).[10]

At the same time, Congress amended section 195. Where before, in areas other than apportionment the Secretary was authorized to use sampling "where he deems it appropriate," Act of Aug. 28, 1957, sec. 14, § 195, the new language *required* the Secretary to use sampling if "feasible" in areas other than apportionment. 13 U.S.C. § 195. That change was accomplished by the change from "may where he deems it appropriate" to "shall, if he considers it feasible" in section 195. Thus the two sections are easily harmonized. The Secretary *may* use sampling for all purposes. The Secretary *must* use sampling at any time that it is "feasible" except in cases of apportionment,

[10] This amendment to section 141(a) meets any possible need for a statement by Congress authorizing the use of sampling. *Cf.* Mem. Opn., Juris. App. 49a-50a; *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 521 (1989).

where he or she is neither required to nor prohibited from using sampling.

If, as plaintiff contends, the addition of section 141(a) was not intended to give the Secretary broad authority to use sampling, including its use in apportionment, of what use was it? The amendment to section 195 already not only authorized, but required the Secretary to use sampling where feasible in cases not involving apportionment. As a practical matter that affirmative requirement encompassed the universe of non-apportionment sampling for the Secretary, because one must assume that in fact the Secretary would not exercise his discretion to use sampling at any time if it were not feasible. If section 141(a) does not give the Secretary authority to use sampling for apportionment, it is of no effect and is mere surplusage.[11]

[11] The canons of statutory construction counsel against construing a statute in a manner that renders some of its provisions surplusage. *Stone v. INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect."); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (court must construe statute to give effect, if possible, to every provision). The canons of statutory construction also counsel against absurd results. *See Burns v. United States*, 501 U.S. 129, 137 (1991); *Public Citizen v. United States Dept. of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring). An interpretation of section 195 that mandates sampling whenever feasible while absolutely forbidding it in the apportionment count would constitute a mandatory two census requirement, one census for apportionment purposes and one for all other purposes. Although two census counts might also be the result of allowing the Secretary not to use sampling for apportionment even when feasible, that result would only obtain if the Secretary, in weighing all of the factors,

Why, however, would Congress give the Secretary more discretion in the sensitive area of apportionment, while requiring sampling in all other cases, where feasible? The answer, it would seem, is that because of the high importance and constitutional significance of apportionment, Congress felt that it was not sufficient that sampling be feasible. Clearly, feasibility of sampling was a necessary condition to its use in apportionment, but not a sufficient condition. In addition to feasibility, the Secretary had to determine that it was indeed sufficiently reliable and indeed sufficiently well accepted to permit its use in apportionment. Congress obviously thought highly of sampling; it permitted it across the board and it mandated it in all cases other than apportionment. But it left to the Secretary the final decision whether or not to use it. In 1990, the Secretary decided not to. For 2000, the Secretary believes that the level of confidence in sampling is now sufficiently high that it can and should be used for apportionment as well.

B. The Department's Assertion of Its Discretion to Determine Whether to Use Sampling is Not New to This Litigation

The Department's assertion of its discretion over whether to use sampling to count population in the decennial census has spanned multiple administrations and both major political parties. *Census 2000 Report*, Joint App. 45. The Department has long conducted itself in a

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decided that the reliability was not high enough to justify the use of sampling for apportionment.

manner that assumes discretion over the use of sampling for apportionment purposes, based on the particular needs of the census and the statistical reliability of sampling technology available. *See Census 2000 Report*, Joint App. 81-82 (describing uses of statistical sampling and imputations since the 1940s to count people who could not be individually located).

As early as the 1970s, the Census Bureau was exploring statistical sampling techniques to address the census undercount. *1976 GAO Report* at 21-22. And, "[t]hrough the mid-1980's, the Bureau conducted a series of field tests and statistical studies designed to measure the utility of the PES [a statistical sampling technique] as a tool for adjusting the census." *Wisconsin*, 517 U.S. at 10.[12] Thus, contrary to the suggestion by plaintiff and in the opinion below, this litigation does not represent a recent reversal by the Department on the issue of its discretion to use sampling. Rather, for well over a decade the Department has operated on the premise that the Census Act permits statistical sampling for apportionment purposes.[13]

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[12] In the district court proceedings challenging the 1990 census methods the Department entered into a stipulation that left open the possibility of using statistical sampling to correct the 1990 census undercount. *See City of New York v. Dept. of Commerce*, 739 F. Supp. at 764. It was only after studying the circumstances of the census, including the specific statistical methods available and their effect on the census, that the Secretary of Commerce decided not to undertake statistical correction. *See* 1991 Commerce Decision, 56 Fed. Reg. 33582.

[13] In support of its position, the Department has relied on judicial decisions since the 1980s expressly ruling that the use of statistical sampling is permitted by the Census Act (*see* footnote

It is true that in justifying the refusal to correct the 1980 census undercount by use of statistical sampling, the Department asserted in litigation, and defended that position in the public record, that the Census Act imposed such a bar.[14] *See, e.g., Carey v. Klutznick*, 508 F. Supp. at 415; 1980 Commerce Decision, 45 Fed. Reg. 69366, 69372 (1980). However, very soon thereafter, as planning for the 1990 census began, the Department reconsidered that position. *See Wisconsin*, 517 U.S. at 10. Although the Secretary of Commerce ultimately vetoed the Census Bureau's preliminary decision to use sampling in the 1990 census, the Secretary stated that "the Bureau would continue its research into the possibility of statistical adjustment of future censuses,. . . . " *Wisconsin*, 517 U.S. at 12; *see also* 1991 Commerce Decision, 56 Fed. Reg.

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4), as well as formal and informal opinions from the Department of Justice issued over the course of two decades to the same effect. *See Census 2000 Report*, Joint App. 133-38.

[14] That this was a litigation stance is apparent from the statement of Vincent Barabba, Director of the Census Bureau, in his 1980 congressional testimony on Problems with the 1980 Census Count: "We are in the midst of a lawsuit at this point. I have been instructed on advice of counsel not to get into too many details on the discussion of the apportionment and the adjustment relative to it." *Problems with the 1980 Census Count: Joint Hearing Before the Commerce, Consumer, and Monetary Affairs Subcommittee of the Committee on Government Operations and the Census and Population Subcommittee of the Committee on Post Office and Civil Service*, 96th Congress, vol. 23 at 173 (1980).

The fact that this prior agency interpretation was developed in a litigation context gives it less weight and makes it all the more appropriate for the Department to alter its position. *See Smiley v. Citibank*, 517 U.S. at 741; *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212-213 (1988).

at 33584. More important, the Secretary did not assert any statutory prohibition to justify the refusal to use statistical sampling in 1990. Such an interpretation of the Census Act was expressly disavowed in the explanation set forth in the public record.[15] Nor did Congress at that time make any move to suggest that the Census Act denied the Secretary discretion over this policy decision. In *Wisconsin*, the Department stated in its brief to this Court that "[w]e agree . . . that the Constitution and the Census Act do not bar the use of statistical sampling in conducting the decennial census." Brief of Federal Petitioners, *Wisconsin v. City of New York*, 1995 WL 668005, *26 (1995). The Secretary of Commerce justified the decision not to use statistical sampling to correct the 1990 census as a reasonable exercise of agency discretion, and this Court upheld the decision on that ground. *See Wisconsin*, 517 U.S. at 24; *see also* 1991 Commerce Decision, 56 Fed. Reg. 33582.

The district court's suggestion that the agency's interpretation is entitled to "less deference" because it constitutes a reversal of position and a litigation strategy (Mem. Opn., Juris. App. 46a-47a n.11) ignores both this history and this Court's previous rulings. "An administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue de novo and without regard to

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[15] *See, e.g.*, 1991 Commerce Decision, 56 Fed. Reg. at 33605 (Secretary states that "neither the Constitution nor the relevant statutory provisions are themselves conclusive"); *id.* at 33606 (Secretary explains that "legal considerations did not provide a basis for my decision.").

the administrative understanding of the statutes." *National Labor Relations Bd. v. Iron Workers*, 434 U.S. 335, 351 (1990). The agency's position is "entitled to deference even if it represents a departure from . . . prior policy." *National Labor Relations Bd. v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990); *see also Smiley v. Citibank*, 517 U.S. at 742 ("[T]he mere fact that an agency interpretation contradicts a prior agency position is not fatal" to judicial deference); *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 417 (1993) ("The Secretary is not estopped from changing a view she believes to have been grounded upon a mistaken legal interpretation."); *Rust v. Sullivan*, 500 U.S. 173, 186 (1991) ("This Court has rejected the argument that an agency's interpretation 'is not entitled to deference because it represents a sharp break with prior interpretations' of the statute in question.") (quoting *Chevron*, 467 U.S. at 862). Significantly, in *Franklin v. Massachusetts*, 505 U.S. 788 (1992), this Court deferred to the Census Bureau and Department of Commerce interpretation of the Census Act as permitting them to include overseas federal employees in the decennial census as residents of the "home of record" listed in personnel files, despite the fact that previous policy had excluded such individuals from the census count. 505 U.S. at 793.

As a result of the Census Act's broad grant of autonomy, the Bureau and Secretary have made significant changes to the census through the years with little outside interference. These include sampling, household forms to replace person-by-person forms, self-enumeration (mail-out/mail-back) to replace face-to-face interviews, optical scanning machines to extract data from questionnaires, "hot deck" imputation to assign values

for missing data, extra field checks to reexamine apparent vacant dwellings, and the postal vacancy check established in 1970. Choldin, *supra*, at 236-37. These changes, when instituted, had "equally weighty numerical implications" as the procedures at issue in this case. *Id.* In each instance, the changes were a result of the Bureau perceiving a problem with the accuracy of the census, developing and testing a solution, and then introducing the solution into the census. *Id.* The use of statistical sampling to correct the differential undercount was approached with the same deliberateness. It is entitled to the same deference.

C. The Department's Interpretation of the Statute is Reasonable

As documented in the district court opinion and in the record herein, the Department of Commerce and the Census Bureau have acted carefully and deliberately in approaching the question of statistical sampling. Indeed, the Department's decision to expand the use of statistical sampling for the 2000 census is based on a much broader consensus among experts, policymakers and politicians than was the case for the Secretary's 1990 decision not to rely on sampling. The Secretary's decision statistically to adjust the initial count in the 2000 census comes after years of study and is anchored in the work and recommendations of the National Academy of Sciences, Census Bureau experts and several advisory committees as well as input from public meetings and members of Congress. *Census 2000 Report*, Joint App. 56-58.

The Secretary's decision not to use statistical sampling to correct the undercount in 1990 was based on his belief that although a statistical adjustment would improve the accuracy of the overall count, it would not improve the accuracy of the distributive count, which was more important for apportionment purposes, and might even "mak[e] the shares less accurate." 1991 Commerce Decision, 56 Fed. Reg. at 33583. *See also Wisconsin*, 517 U.S. at 11, 20-21. This concern has now been resolved by changes in the statistical sampling procedures planned for the 2000 census. *See Census 2000 Report*, Joint App. 87-98. Unlike what was proposed for 1990, in the 2000 census a sample from one state will not be used to count population in another state. *Id.*, Joint App. 94. Thus, not just at the national level but also "[a]t all geographic levels important to political representation and funds allocation, Census 2000 will provide more accurate results than physical enumeration alone." *Census 2000 Report*, Joint App. 44.

The policy considerations surrounding the census undercount reinforce the wisdom of allowing the Department of Commerce discretion in the use of statistical sampling. The social, economic and political problems that result from a persistent and uncorrected undercount are enormous. When that undercount can be corrected, but is not, the integrity and democratic character of our system of representation are, understandably, called into question. That minority groups dramatically and disproportionately bear the burden of the undercount further aggravates the social, political and economic disjuncture.

" 'The power of an administrative agency to administer a congressionally created . . . program necessarily

requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.' " *Chevron*, 467 U.S. at 843 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)); *see also Auer v. Robbins*, ___ U.S. at ___, 117 S. Ct. at 910; *Department of the Treasury v. Federal Labor Relations Authority*, 494 U.S. 922, 933 (1990). "An initial agency interpretation is not instantly carved in stone" and it is entirely appropriate for the agency to "consider varying interpretations and the wisdom of its policy on a continuing basis." *Chevron*, 467 U.S. at 863-64.

Finally, Department of Commerce discretion is consistent with, and indeed necessary for, achievement of the fundamental goal of the census: to provide the basis for equal apportionment. There is no question in this case that the goal of the Commerce Department is to use statistical sampling to increase accuracy and that the Secretary of Commerce has reasonably determined that statistical sampling will, in fact, increase accuracy.

It is now apparent that the obstacles are such that no matter how much money and effort are put into traditional counting methods, those methods, standing alone, cannot hope to address the undercount problem.[16] The

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[16] *Census 2000 Report*, Joint App. 42, 49-52, 99, 106-07; *Modernizing the U.S. Census* at 3. In the 1990 census, the Census Bureau expanded and improved all the traditional methods and spent more money than ever before. Notwithstanding these extraordinary efforts, the traditional counting methods resulted in census figures that were less accurate than the 1980 census, a census that failed to count 4.7 million people, and a differential undercount that denied California a seat in the House of Representatives and hundreds of millions of dollars in federal funds to which it otherwise would have been entitled.

refinement of the mathematical tools together with the overriding need to address the disparate undercount makes the Department's decision to use statistical sampling in the 2000 Census not only reasonable, but compelling.

This Court's conclusion in *Good Samaritan Hospital* speaks directly to this case:

> In the circumstances of this case, where the agency's interpretation of a statute is at least as plausible as competing ones, there is little, if any, reason not to defer to its construction. We should be especially reluctant to reject the agency's current view which, as we see it, so closely fits "the design of the statute as a whole and . . . its object and policy."
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> *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 417-18 (1993) (quoting *Crandon v. United States*, 494 U.S. 152, 158 (1990)).

II. THE CONSTITUTION DOES NOT PROHIBIT THE USE OF STATISTICAL SAMPLING

In *Wisconsin v. City of New York*, this Court stated the Constitutional standard that governs this case:

> [S]o long as the Secretary's conduct of the census is "consistent with the constitutional language and the constitutional goal of equal representation," Franklin, 505 U.S. at 804, it is within the limits of the Constitution. In light of the Constitution's broad grant of authority to Congress, the Secretary's decision not to adjust need bear only a reasonable relationship to the accomplishment of an actual enumeration of the

> population, keeping in mind the constitutional purpose of the census.
>
> 517 U.S. at 19-20.

The use of statistical sampling planned by the Secretary of Commerce for the 2000 census is consistent with the language of the Constitution and is demanded by the constitutional goal of equal representation.

The critical constitutional provision is Article I, Section 2, Clause 3, which provides:

> Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each state shall have at least one Representative; . . .
>
> U.S. Const. art. I, § 2, cl. 3.[17]

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[17] The three-fifths rule was later superseded by Section 2 of the Fourteenth Amendment. In the proceedings below, plaintiffs argued that the Fourteenth Amendment language that representatives shall be apportioned "counting the whole number of persons in each state, . . . " forbids statistical adjustment of the census. U.S. Const. amend. XIV, § 2. It is

The disputed language is the phrase "actual enumeration." To determine the meaning of that phrase, it is appropriate to look to three sources: the language itself, the historical context in which it was adopted, and the purpose of the provision. Each source supports a construction that allows for the statistical sampling at issue here.

The word "enumeration" is defined in Samuel Johnson's 1773 dictionary as "[t]he act of numbering or counting over; number told out." 1 Samuel Johnson, *A Dictionary of the English Language* (1773). Webster's 1806 dictionary states that "enumeration" means "a numbering or counting over."[18] Noah Webster, *A Compendious Dictionary of the English Language: A Facsimile of the First (1806) Edition* (Crown Publishers 1970). Use of the term "enumeration" elsewhere in the Constitution suggests that it is synonymous with "census." *See* U.S. Const.

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obvious, however, that "whole number of persons" in the Fourteenth Amendment was intended to repeal and replace the three-fifths rule of Article I, Section 2, Clause 3. In this respect, the Fourteenth Amendment, if anything, would demand that the census be corrected, because the differential undercount that results from a traditional census means, as a practical matter, that members of groups protected by the Fourteenth Amendment are counted as less than a whole person.

[18] Both Webster's and Johnson's definition of the term "enumerate" would likewise support an interpretation that allows for the use of statistical sampling. Johnson provides three definitions for the word "enumerate": "To reckon up singly; to count over distinctly; to number." Johnson, *supra*. Webster defines "enumerate" as "to number up, count over, recite." Webster, *supra*. Each dictionary, then, includes the general notion of counting, and the statistical technique at issue here is just that, a form of counting.

art. I, § 9, cl. 4 ("No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."). These formal definitions and usage comport with common sense: to enumerate or conduct an enumeration means to count or ascertain the number. That was still the definition of "enumeration" in 1933, and it is still the definition today.[19]

Similarly, the word "actual" supports an interpretation of the constitution that permits the statistical sampling contemplated here. *See* Johnson, *supra*. ("Really in act; not merely potential");[20] Webster (1806), *supra* ("really in act, real, certain, positive"). There is no doubt that the Census Bureau's use of statistical sampling to supplement traditional counting methods will be a real ascertainment of population; indeed, all evidence is that it will be a much more accurate count than one based exclusively on traditional methods.

There are various ways to conduct an actual count. One may count singly, in groups, by multiplying, and by the use of statistical techniques such as those at issue here. One may count by personal observation, through hearsay information, and through imputation. For many

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[19] *See, e.g.*, 3 *The Oxford English Dictionary* 227 (1933); *Webster's New World Dictionary of American English* (Victoria Neufeldt & David Guralnik eds., 3d ed. 1988).

[20] This is Johnson's second definition. The first, which does not pertain here, is "[t]hat which comprises action." *Id.* The third definition offered is "[i]n act; not purely in speculation." *Id.* Neither of these two alternative definitions is inconsistent with the Department's use of statistical sampling.

years, the decennial count of the population was done by personal observation, with U.S. Marshals or Census Bureau enumerators ascertaining numbers in household groups and in categories by gender and status within the household. Hearsay, however, was used when personal observation was not possible. In the twentieth century, counting by personal observation was replaced by a mail procedure, because the Census Bureau and the Department of Commerce found that mail responses allowed a more accurate count. Now, the Department wishes to use statistical sampling to supplement the traditional procedures and correct for errors that the traditional procedures are known to produce. Each step in this evolution is consistent with the words of the Constitution calling for an "actual enumeration" and with the words of the Constitution expressly stating that the count shall be "in such manner as they [Congress] shall by law direct."[21] U.S. Const., art. I, § 2, cl. 3.

This conclusion is further reinforced when one looks to the history of Article I, Section 2. It is useful to remember that just as a census by U.S. mail was not within anyone's contemplation in the 18th century, neither was statistical sampling. Indeed, nothing at all comparable to statistical sampling existed at that time. Nor were such issues the focus of any of the debates surrounding Article I, Section 2.

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[21] That Congress' discretion in this regard is "virtually unlimited" and has been delegated to the Secretary of Commerce was unanimously resolved by this Court in *Wisconsin v. City of New York*, 517 U.S. at 19.

The census requirement was a byproduct of the Great Compromise, which established a bicameral Legislature with equal representation of each state in the Senate and proportional representation in the House of Representatives. It was within the context of this overarching debate that the census requirement was adopted in order to provide a basis for proportional apportionment of representatives among the states.

There was very little direct discussion of the census during the Federal Convention of 1787; rather, to the extent the census was addressed, it was in connection with the rule of representation for the House of Representatives. The discussions occurred at three points: June 11, July 5-13, and August 8, 1787. The debates surrounding this issue are reported in *The Records of the Federal Convention of 1787* ("*Records of the Federal Convention*"), *supra*. *See* 1 *Records of the Federal Convention* at 196-208, 524-606; 2 *Records of the Federal Convention* at 221-23. Resolutions and proposals regarding language are also reported in 1 *Records of the Federal Convention* at 193, 227-29 and 2 *Records of the Federal Convention* at 130-31, 178, 182-83, 219, 571, 590-91 and 607-08.[22] The census was also addressed by James Madison in The Federalist Papers. *The Federalist Nos. 54, 58* (James Madison). The history of the Constitution reveals that there were two issues in dispute and that they were resolved as follows.

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[22] For a summary of the Convention proceedings relating to the census, see Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 70-74 (1996); *see also* Declaration of Jack N. Rakove, Joint App. 381-99.

The first issue was whether the rule of representation, and hence the census, was to be based on population or on wealth. *See* 1 *Records of the Federal Convention* at 205-08, 533-34, 536-37, 540-42, 559-62, 567, 582-88, 591-97. Part of this issue was controversy over whether and how to include the slave population. *Id.* at 205-06, 561, 580-82, 586-88, 592-97, 603-04; *see also* 2 *Records of the Federal Convention* at 220-23. Ultimately, representation based on population was written into the Constitution. The only compromise in this respect was that slaves, who in other aspects of the law were treated as property, would be treated as people, provided, however, that an individual bound in slavery would be counted as only three-fifths of a person. U.S. Const., art. I, § 2, cl. 3.

The second issue was whether the relative legislative power of the states established by the initial apportionment should or would be locked in. 1 *Records of the Federal Convention* at 534, 558-61, 567, 578-80, 583-86, 599. The backdrop for this debate was the power struggle between large and small states, between northern and southern states and between the Atlantic states and the anticipated new states in the West. *See id.* at 533-34, 536-37, 540-41, 560, 562, 567, 571, 578-79, 583, 601-02, 604-05. The question was should the national Legislature[23] be at liberty regarding whether, how often and on what basis to reapportion, or should periodic reapportionment be required

[23] Apportionment under the direction of the General Legislature was seen as desirable because the states would not be impartial. 1 *Records of the Federal Convention* at 580.

by the Constitution. *Id.* at 571, 578-79, 581-86.[24] An adjunct of this issue was the question of whether the number of representatives in the first house of the legislature should grow or change. *Id.* at 533-34, 560; *see also The Federalist Nos. 54, 58* (James Madison). Ultimately, the Constitution fixed a requirement of periodic apportionment to occur every ten years and to be based upon a population formula which counted "the whole number of free persons," excluded "Indians not taxed," and counted slaves as "three-fifths of all other persons." U.S. Const., art. I, § 2, cl. 3. And, the national Legislature was left at liberty to determine the manner in which the census would be conducted. *Id.*

Notably absent from the debates is any discussion whatever regarding how population data was to be collected. Instead, the call for a census stands in juxtaposition to the entirely conjectural numbers that were used for the first apportionment. *See* 1 *Records of the Federal Convention* at 578 (contrasting "the conjectural ratio which was to prevail in the outset" with "a Revision from time to time according to some permanent & precise standard . . . "); *id.* at 602 (Mr. Elseworth contrasts an "actual census" with the initial apportionment; Mr. Mason "doubted much whether the conjectural rule which was to precede the census, would be as just, as it would be rendered by an actual census."); *id.* at 559 (initial apportionment "did not appear to correspond

[24] The concern that leaving whether and on what basis to reapportion to the Legislature would work against the interests of the Southern states was also expressed in connection with how slaves would be treated in the calculation. *Id.* at 592-96.

with any rule of numbers, or of any requisition hitherto adopted by Congs."); *id.* at 560 (initial apportionment "little more than a guess."); *id.* at 579 (initial apportionment "a mere conjecture"); *id.* at 586 ("the (temporary) allotment" at the outset gave the Southern states more than the formula for counting free and enslaved persons would have); *see also The Federalist No. 36*, at 172 (Alexander Hamilton) (Bantam Classic ed. 1982) (state's share of taxes based on census rather than discretion of the Legislature).[25]

The term "actual enumeration" was introduced by the Committee of Style only in the final week of the Convention and was never discussed. 2 *Records of the Federal Convention* at 590.[26] Throughout the debates, the delegates used the word "census," not the word "enumeration" to describe what they wanted. Census was the term used in motions and votes on motions, 1 *Records of the Federal Convention* at 564, 575, 586, 589, 590, 591, 596, 598, and in the statements of the delegates. *Id.* at 567 (Randolph), 570 (Randolph), 571 (Morris), 579 (Williamson), 580 (Randolph), 583 (Morris), 592 (Pinkney),

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[25] Unlike an apportionment based on an actual census, the initial apportionment gave states credit for anticipated future growth in setting their number of representatives. *See, e.g.*, 1 *Records of the Federal Convention* at 561, 568 (Georgia); *id.* at 566, 601 (New Hampshire).

[26] The records of the convention on Article I, Section 9, where the term "enumeration" also appears state that this term is "explanatory" of "census." *See* 2 *Records of the Federal Convention* at 618; *see also The Federalist No. 36*, at 172 (Alexander Hamilton) (Bantam Classic ed. 1982) (regarding state's proportional share of taxes, "[a]n actual census or enumeration of the people must furnish the rule; . . . ").

594 (Randolph), 595 (Wilson), 600 (Gerry), 602 (Elsworth, Wilson, Mason), 603 (Gerry); *see also* 2 *Records of the Federal Convention* at 131 (resolution of Committee on Detail). This sequence of events and use of language, supports the conclusion that the "actual enumeration" required by Article I, Section 2 simply means an actual census.

Finally, the statistical correction contemplated by the Department of Commerce is not only consistent with but is demanded by the fundamental purpose of Article I, Section 2: subject only to the provision that each state shall have one representative, this constitutional provision calls for apportionment and subsequent redistricting on the basis of one-person-one-vote. *See Karcher v. Daggett*, 462 U.S. 725 (1983); *Wesberry*, 376 U.S. 1. The decision in *Wisconsin* does not vitiate that constitutional command, it merely tempers it with deference to the discretion of the Secretary of Commerce, under the broad delegation of authority from Congress, to decide what will, in fact, enhance census accuracy and hence advance the underlying goal of equal apportionment. 517 U.S. 1.

Here, as in *Wisconsin*, "the Secretary of Commerce, to whom Congress has delegated its constitutional authority over the census," has exercised that authority "in light of the constitutional purpose of the census . . . " 517 U.S. at 24. The only difference is that in *Wisconsin*, the Secretary determined that an "actual enumeration" would best be achieved without the use of the statistical sampling techniques then available, whereas here the Secretary has determined that an "actual enumeration" will best be

achieved by using the much more refined techniques that are now available.

CONCLUSION

The judgment below should be reversed.

The Secretary of Commerce should be allowed to provide the several States with the most accurate enumeration that is within his power to achieve.

Dated: October 5, 1998.

Respectfully submitted,

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APPENDIX

Constitutional Provisions and Statutes Involved

U.S. Constitution, art. I, § 2, cl. 3 provides:

3. Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each state shall have at least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

U.S. Constitution, art. I, § 9, cl. 4 provides:

4. No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

U.S. Constitution, Am. XIV, § 2, first sentence provides:

SECTION 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed.

U.S. Code, Title 13, § 141 provides:

§ 141. Population and other census information

(a) The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date", in such form and content as he may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.

(b) The tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States.

(c) The officers or public bodies having initial responsibility for the legislative apportionment or districting of each State may, not later than 3 years before the decennial census date, submit to the Secretary a plan

identifying the geographic areas for which specific tabulations of population are desired. Each such plan shall be developed in accordance with criteria established by the Secretary, which he shall furnish to such officers or public bodies not later than April 1 of the fourth year preceding the decennial census date. Such criteria shall include requirements which assure that such plan shall be developed in a nonpartisan manner. Should the Secretary find that a plan submitted by such officers or public bodies does not meet the criteria established by him, he shall consult to the extent necessary with such officers or public bodies in order to achieve the alterations in such plan that he deems necessary to bring it into accord with such criteria. Any issues with respect to such plan remaining unresolved after such consultation shall be resolved by the Secretary, and in all cases he shall have final authority for determining the geographic format of such plan. Tabulations of population for the areas identified in any plan approved by the Secretary shall be completed by him as expeditiously as possible after the decennial census date and reported to the Governor of the State involved and to the officers or public bodies having responsibility for legislative apportionment or districting of such State, except that such tabulations of population of each State requesting a tabulation plan, and basic tabulations of population of each other State, shall, in any event, be completed, reported, and transmitted to each respective State within one year after the decennial census date.

(d) Without regard to subsections (a), (b), and (c) of this section, the Secretary, in the year 1985 and every 10 years thereafter, shall conduct a mid-decade census of

population in such form and content as he may determine, including the use of sampling procedures and special surveys, taking into account the extent to which information to be obtained from such census will serve in lieu of information collected annually or less frequently in surveys or other statistical studies. The census shall be taken as of the first day of April of each such year, which date shall be known as the "mid-decade census date".

(e)(1) If –

(A) in the administration of any program established by or under Federal law which provides benefits to State or local governments or to other recipients, eligibility for or the amount of such benefits would (without regard to this paragraph) be determined by taking into account data obtained in the most recent decennial census, and

(B) comparable data is obtained in a mid-decade census conducted after such decennial census,

then in the determination of such eligibility or amount of benefits the most recent data available from either the mid-decade or decennial census shall be used.

(2) Information obtained in any mid-decade census shall not be used for apportionment of Representatives in Congress among the several States, nor shall such information be used in prescribing congressional districts.

(f) With respect to each decennial and mid-decade census conducted under subsection (a) or (d) of this section, the Secretary shall submit to the committees of Congress having legislative jurisdiction over the census –

(1) not later than 3 years before the appropriate census date, a report containing the Secretary's determination of the subjects proposed to be included, and the types of information to be compiled, in such census;

(2) not later than 2 years before the appropriate census date, a report containing the Secretary's determination of the questions proposed to be included in such census; and

(3) after submission of a report under paragraph (1) or (2) of this subsection and before the appropriate census date, if the Secretary finds new circumstances exist which necessitate that the subjects, types of information, or questions contained in reports so submitted be modified, a report containing the Secretary's determination of the subjects, types of information, or questions as proposed to be modified.

(g) As used in this section, "census of population" means a census of population, housing, and matters relating to population and housing.

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U.S. Code, Title 13, § 195 provides:

§ 195. Use of sampling

Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

Pub. L. No. 105-119, 111 Stat. 2440, 2482 (1997), Section 209(e)(1) provides:

(e)(1) Any action brought under this section shall be heard and determined by a district court of three judges in accordance with section 2284 of title 28, United States Code. The chief judge of the United States court of appeals for each circuit shall, to the extent practicable and consistent with the avoidance of unnecessary delay, consolidate, for all purposes, in one district court within that circuit, all actions pending in that circuit under this section. Any party to an action under this section shall be precluded from seeking any consolidation of that action other than is provided in this paragraph. In selecting the district court in which to consolidate such actions, the chief judge shall consider the convenience of the parties and witnesses and efficient conduct of such actions. Any final order or injunction of a United States district court that is issued pursuant to an action brought under this section shall be reviewable by appeal directly to the Supreme Court of the

United States. Any such appeal shall be taken by a notice of appeal filed within 10 days after such order is entered; and the jurisdictional statement shall be filed within 30 days after such order is entered. No stay of an order issued pursuant to an action brought under this section may be issued by a single Justice of the Supreme Court.
